UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE SOUTH DAKOTA DEPARTMENT OF SOCIAL SERVICES, Defendant.	)	Civil Action No. 5:15-cv-05079-JLV

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The parties in this case have moved for summary judgment on the same issue – whether the United States can make out a *prima facie* case that Defendant South Dakota Department of Social Services ("DSS") engaged in a pattern or practice of intentional discrimination against Native American applicants for Specialist positions at its Pine Ridge office from 2007 through 2013. (*Compare* Dkt. 41, *with* Dkt. 45.[1]) The United States contends that it has already established a *prima facie* case through undisputed evidence in its Motion for Partial Summary Judgment. (Dkt. 45.) Specifically, the undisputed evidence establishes that DSS hired Native American applicants at a statistically significantly lower rate than white applicants for seven years, that DSS offered to hire zero Native American applicants for five of the seven years, and that DSS repeatedly rejected admittedly qualified Native American applicants. (Dkt. 46.) As shown below, there is yet more evidence on which the Court can ultimately find for the United States when genuine disputes of material fact are also considered.

DSS's arguments against the *prima facie* case (Dkt. 43) ring hollow. First, DSS makes a novel argument that evidence of a pattern or practice of discrimination must span all 64 of its offices to be actionable. To the contrary, the United States can establish a pattern or practice of intentional discrimination based on the stark hiring practices of the Pine Ridge office. Next, DSS criticizes the sample size examined by the United States' statistical expert. Notwithstanding that DSS's argument is misplaced in a motion for summary judgment, the 35

[1] Throughout this Memorandum, the United States refers to Defendant's Motion for Summary Judgment (Dkt. 41), Defendant's Brief in Support of Motion for Summary Judgment (Dkt. 43), Plaintiff United States' Motion for Partial Summary Judgment (Dkt. 45), Brief in Support of Plaintiff United States' Motion for Partial Summary Judgment (Dkt. 46), and Statement of Material Facts in Support of Plaintiff United States' Motion for Partial Summary Judgment ("Pl. SMF") (Dkt. 47).

hiring decisions at issue here are sufficient to support the inference of a discriminatory pattern or practice. Finally, DSS incorrectly posits that the self-serving conclusory statements of its own hiring officials are the only anecdotal evidence in the record and, thus, insufficient evidence of intentionally discriminatory hiring practices.

In the alternative, DSS argues that prospective injunctive relief is unwarranted as a matter of law based on the unexplained increase of Native American hires in recent years. Although the United States' statistical expert demonstrated that DSS's hiring of Native Americans improved in 2014 and 2015, the statistics cannot explain why these improvements occurred and they cannot ensure that this limited two-year hiring pattern will continue. Accordingly, the United States maintains its request for injunctive relief to ensure that DSS complies with Title VII.

II. LEGAL STANDARD

Summary judgment is appropriate when the record, viewed in the light most favorable to the non-moving party, demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). When the defendant moves for summary judgment on the plaintiff's *prima facie* case, the plaintiff need only show that there is a genuine dispute of material fact regarding the establishment of the *prima facie* case. "The bottom-line question," according to the Eighth Circuit, "is whether Plaintiffs produced more than a scintilla of evidence showing [Defendant] engaged in a pattern or practice of discrimination with regard to the class members." *Morgan v. United Parcel Serv. of Am., Inc.*, 380 F.3d 459, 464 (8th Cir. 2004). "'[T]here must be evidence on which the [fact-finder] could reasonably find for the plaintiff.'" *Id.* at 463 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)*; see, e.g.*, *Wright v. Stern*, 450 F. Supp. 2d 335, 366 (S.D.N.Y. 2006) ("Because

material issues of fact exist as to whether Parks' intentionally discriminated in granting promotions and setting wages, defendants' motion for summary judgment with respect to plaintiffs' disparate treatment compensation and promotion claims is denied.").

Where, as here, cross-motions for summary judgment have been presented to the Court, "the standard summary judgment principles apply with equal force." *Wright v. Keokuk Cnty. Health Ctr.*, 399 F. Supp. 2d 938, 945-46 (S.D. Iowa 2005) (citing *New Eng. Reg. Council of Carpenters v. Kinton*, 284 F.3d 9, 19 (1st Cir. 2002)). "When faced with cross-motions, the normal course for the trial court is to 'consider each motion separately, drawing inferences against each movant in turn.'" *Id.* at 946 (quoting *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 603 n.8 (1st Cir. 1995)).

III. DSS IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE UNITED STATES' PATTERN-OR-PRACTICE DISPARATE TREATMENT CLAIM UNDER TITLE VII

In its motion, DSS contends that the United States cannot meet its burden to show a *prima facie* case. DSS incorrectly argues that there can be no pattern or practice of discrimination at only one of DSS's 64 offices and that the United States' statistical evidence is too limited to serve as the basis for such a claim. DSS also asserts that the United States lacks anecdotal evidence of discriminatory hiring practices. DSS's arguments are baseless.

A. A Pattern-or-Practice Claim of Disparate Treatment at a Single DSS Office is Permitted Under Title VII

DSS's argument that a pattern or practice of discrimination must permeate every corner of an organization to be actionable evinces a basic misunderstanding of Title VII and its protections. DSS suggests that, even taking the United States' evidence at face value, discrimination in the hiring of one class of employees at one office is "isolated" and "sporadic" as a matter of law. (Dkt. 43 at 11; *see also id.* at 13-14.) To the contrary, the evidence of DSS's

sustained discrimination in hiring for Specialists at Pine Ridge over seven years, 35 requisitions, and hundreds of applicants establishes "a regular procedure or policy" as required for the *prima facie* case of a pattern or practice of intentional discrimination. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977).

Pattern-or-practice disparate treatment claims have procedures, burdens, and relief that are distinct from individual disparate treatment claims. *See generally United States v. City of New York*, 717 F.3d 72, 82-88 (2d Cir. 2013). Whereas individual disparate treatment claims can be brought by an individual plaintiff to remedy "an isolated, sporadic incident" with situation-specific relief, pattern-or-practice disparate treatment claims must be brought by the government or a class of plaintiffs to remedy "repeated, routine, or . . . generalized" discrimination with systemic relief. *See Teamsters*, 431 U.S. at 336 n.16; *City of New York*, 717 F.3d 72, 82-88 (2d Cir. 2013); *see also EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1075 (C.D. Ill. 1998). As an imperfect shorthand, courts sometimes refer to the latter as "company-wide" discrimination. *See, e.g.*, *EEOC v. Tricore Reference Labs.*, 849 F.3d 929, 937 (10th Cir. 2017).

DSS relies on courts' use of the phrase "company-wide" to import an entirely novel – and fatally flawed – requirement to pattern-or-practice cases. (*See* Dkt. 43 at 12 (collecting cases).) DSS argues that it is not liable for a pattern or practice of discrimination simply because the United States confines its allegations and proof of systemic discrimination to one office and one class of employees. (*See id.* at 11.) Following DSS's logic, an employer would not violate Title VII by never hiring women as managers if it hired women as secretaries. And, according to DSS's reasoning, it would not violate Title VII to condone rampant discrimination by managers in one department so long as not all managers in all other departments engaged in discrimination. This bald attempt to severely limit the protections offered by Title VII must be rejected.

Title VII prohibits any pattern or practice of discrimination, regardless of breadth, so long as the employer "repeatedly and regularly engaged in acts prohibited by the statute." *See Teamsters*, 431 U.S. at 336 n.16. Courts have made clear that "[a] pattern or practice of discrimination may be found even if a defendant does not discriminate uniformly." *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 807 (E.D. Pa. 1989) (discussing *Teamsters* in a case under Title II of the Civil Rights Act) (citations omitted), *aff'd*, 894 F.2d 83 (3d Cir. 1990); *see also United States v. Ironworkers Local 86*, 443 F.2d 544, 552 (9th Cir. 1971). Indeed, the Supreme Court has suggested that plaintiffs could establish a pattern or practice of discrimination based on "a companywide policy, or even a consistent practice within a given department." *See Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 878 (1984).

The cases cited by DSS do not hold otherwise. For the most part, DSS's cases use the phrase "company-wide" without explanation. (*See* Dkt. 43 at 12.) Two of these cases, however, militate implicitly or explicitly against DSS's own novel arguments.

First, in *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.*, 990 F. Supp. 1059 (C.D. Ill. 1998), the district court explicitly rejected the argument now presented by DSS. There, the district court considered the EEOC's allegation of sexual harassment at one of Mitsubishi's auto assembly facilities. *Id.* at 1069. The court used the phrase "systemic, company-wide discrimination" when describing pattern-or-practice cases. *See id.* at 1070; *see also id.* at 1075. In a footnote, however, the court stated that "[t]he sexual harassment need not occur in the auto assembly plant, as a whole, to be actionable in a pattern or practice case." *Id.* at 1075 n.8. Instead, "if the alleged harassment is only occurring in one or two areas of the plant," then the court would focus its review on those areas. *See id.* "To do otherwise would effectively mean that Title VII did not apply to those unlucky enough to work in the areas in which the alleged

harassment was occurring, simply because this harassment was not occurring every place else." *Id.*

Second, in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Supreme Court asked whether the plaintiffs "demonstrate[d] that the entire company operate[d] under a general policy of discrimination" because the plaintiffs had alleged a nationwide claim. *See id.* at 358 (citations and internal quotation marks omitted); *see also id.* at 345. The Supreme Court rejected class certification for the nationwide claim because the statistical and anecdotal evidence could not support the inference of discrimination at every one of Wal-Mart's 3,400 stores. *See id.* at 356-58. The case has since fractured into subparts alleging region-specific individual and class claims. *See Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 642 (6th Cir. 2015) (collecting subsequent cases). Far from supporting DSS's argument requiring allegations of "company-wide" discrimination, *Wal-Mart* suggests that claims of discrimination should be tailored to the facts of the case.[2]

In this case, the United States has presented evidence of repeated and routine discrimination against Native Americans in DSS's hiring of Specialists at Pine Ridge from 2007 through 2013. This evidence need not be uniform across DSS to establish a pattern or practice of discrimination. At base, DSS cannot escape liability for the discrimination at this office by claiming there is no evidence that it discriminated at other offices.

[2] Nor are these more tailored pattern-or-practice cases unique. In *Brown v. Nucor Corp.*, 785 F.3d 895 (4th Cir. 2015), the plaintiffs alleged discrimination at one of 22 steel plants nationwide. *See id.* at 910; *see also* Nucor's Br. on Appeal, 2013 WL 6061283, at *5. Similarly, in *EEOC v. Dial Corp.*, 469 F.3d 735 (8th Cir. 2006), the EEOC brought allegations against just one of the international company's plants. *See id.* at 739. Finally, in *EEOC v. JBS USA, LLC*, 940 F. Supp. 2d 949 (D. Neb. 2013), the district court noted that the EEOC had brought separate actions to allege a pattern or practice of discrimination at two of defendant's facilities. *See id.* at 973.

B. The Evidence of Specialist Hiring Decisions at DSS is Sufficient to Support an Inference of a Discriminatory Pattern or Practice

In support of its motion, DSS concedes that the United States' statistical evidence is "probative of discriminatory practices" and "may not be invalid *per se*," but attempts to criticize the sample size examined by the United States' statistical expert. (Dkt. 43 at 15.) As a threshold matter, DSS's arguments on this point are premature under the burden-shifting standard established in *Teamsters*. Once the United States has established a *prima facie* case, DSS will have an opportunity to rebut it by "presenting a direct attack on the [plaintiff's] statistics." *City of New York*, 717 F.3d at 85. Nevertheless, the 35 hiring decisions at issue here are, in fact, sufficient to support the inference of a discriminatory pattern or practice for the United States' *prima facie* case.

Between 2007 and 2013, DSS sought to hire Specialists through 35 open and competitive requisitions.[3] (Dkt. 47, Pl. SMF ¶ 34.) That is, on 35 separate occasions, DSS made decisions either to offer the Specialist position to an applicant or to cancel the requisition without a hire, often re-advertising the same position with a new requisition number. (*Id.* ¶¶ 21-22.) Between 2007 and 2013, DSS offered to hire 22 applicants through 20 separate requisitions and cancelled 15 requisitions. (*Id.* ¶ 48; *see also* Dkt. 47, Pl. SMF Ex. C, Applicant Flow Documents (2007-2013).) In support of its motion, DSS incorrectly focuses on the number of offers DSS made

[3] In support of its motion, DSS cites to the allegation in the United States' Amended Complaint that "from January 1, 2007 to December 31, 2013, DSS posted to the general public 38 Specialist positions at its Pine Ridge Office." (Dkt. 43 at 7, citing Dkt. 26 ¶ 16.) The United States subsequently learned that two of the positions were internal promotional opportunities for Specialist positions that were not open to the general public (Dkt. 47, Pl. SMF ¶ 27), and one position was for a Specialist Supervisor (*id.* ¶ 28). Accordingly, the United States excluded those three positions from its analysis, resulting in 35 open and competitive requisitions for Specialist positions.

during the seven-year time period, rather than the number of hiring decisions. (*See* Dkt. 43 at 14.)

DSS's 35 hiring decisions are legally sufficient to support an inference of discrimination. As DSS noted in its motion, the Eighth Circuit has held that "a sample of fifteen (or eighteen) employment decisions over a period of more than eight years is simply too small to support any inference of a discriminatory pattern or practice." *Coble v. Hot Springs Sch. Dist. No. 6*, 682 F.2d 721, 734 (8th Cir. 1982). In a case quoted by the Eighth Circuit, however, the Fourth Circuit held that 35 hiring decisions over seven years, the precise number of decisions and timeframe here, was "quite sufficient as a basis for inferring the pattern of discrimination prima facie established." *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1193-94 (4th Cir. 1981). Here, too, the Court should find that DSS's 35 hiring decisions are "quite sufficient" to support an inference of discrimination.

C. The United States Has Presented Ample Anecdotal Evidence to Support a *Prima Facie* Case

Finally, DSS argues in support its motion that "[t]he anecdotal evidence developed to date does not support a finding of intentional discrimination."[4] (Dkt. 43 at 16.) In this case, the United States deposed six comparators hired by DSS, ten hiring officials, and one company designee. Meanwhile, DSS took no fact depositions, failing to depose any of the 26

[4] The United States continues to rely on the *undisputed* statistical and anecdotal evidence based on the hiring patterns as well as the deposition testimony of DSS hiring officials, as recounted in its Memorandum in Support of its Motion for Partial Summary Judgment. (*See* Dkt. 46.) Because the United States demonstrated a "gross statistical disparit[y]," anecdotal evidence is not required. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977). The United States nevertheless offers additional anecdotal evidence to further buttress the *prima facie* case. *See Am. Nat'l Bank*, 652 F.2d at 1188 ("This prima facie showing may in a proper case be made out by statistics alone, or by a cumulation of evidence, including statistics, patterns, practices, general policies, or specific instances of discrimination." (internal citations omitted)).

representative class members or any of the former DSS employees identified by the United States as its potential Stage I witnesses. Instead, in support of its position, DSS relies solely on snippets of conclusory self-serving testimony from the United States' depositions of DSS hiring officials. Conflicting testimony from these depositions, as well as evidence left unexplored by DSS, provides ample anecdotal evidence for a fact-finder to conclude that DSS engaged in a pattern or practice of intentional discrimination.

Not surprisingly, DSS hiring officials do not admit that they intentionally discriminated against Native American applicants. However, "[f]ifty years after the passage of the civil rights laws, it is unlikely that there will be a smoking gun," *Small v. Mass. Inst. of Tech.*, 584 F. Supp. 2d 284, 294 (D. Mass. 2008), and plaintiffs in a Title VII case are not "obligated to present 'smoking-gun' proof of intentional discrimination in order to obtain judgment," *United States v. City of New York*, 683 F. Supp. 2d 225, 252 (E.D.N.Y. 2010), *rev'd in part*, 717 F.3d 72 (2013). Indeed, courts acknowledge that "[d]irect proof of an employer's state of mind is 'hard to come by,' and intentional discrimination may be revealed through circumstantial evidence alone." *City of New York*, 683 F. Supp. 2d at 252 (citations omitted). Moreover, "[t]he Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus." *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59 (1st Cir. 1999). A fact-finder "may infer the presence of a conscious or unconscious prejudice where a disparity in treatment is striking." *Douglas v. J.C. Penney Co., Inc.*, 422 F. Supp. 2d 260, 276 (D. Mass. 2006).

In its motion, DSS asserts that the United States cannot prove intentional discrimination with the current anecdotal evidence. DSS argues that the only anecdotal evidence in the record shows that the hiring officials did not know the race of applicants, and that the hiring officials

always hired the "best qualified" applicant for the Specialist position. A genuine issue of material fact exists regarding both of these assertions. Furthermore, the anecdotal evidence is not limited to the deposition testimony cited by DSS in its brief.[5] Additional anecdotal evidence developed during discovery suggests that DSS's Pine Ridge office was a workplace full of discriminatory biases against Native Americans.

1. A Genuine Issue of Material Fact Exists Regarding Hiring Officials' Knowledge of Applicants' Race

Although DSS cites testimony in support of its motion asserting that its hiring officials did not know applicants' races (Dkt. 43 at 16), this is disputed. The South Dakota Bureau of Human Resources collected each applicant's self-identified racial classification at the time of his or her application, but these racial classifications were not communicated to DSS hiring officials during the hiring process. (Swedish Aff., Ex. C, Johnson 30(b)(6) Dep. 66:20-67:5.) However, DSS hiring officials could still learn of a Native American applicant's race in at least three other ways: (1) through the applicant's own self-identification of race in the application itself; (2) based on the applicant's name; and (3) based on the applicant's appearance at the in-person interview.

Given DSS's stated preference for applicants with knowledge of Native American culture (Dkt. 47, Pl. SMF Ex. F, Weaver Report at 7-8), Native American applicants regularly described

[5] Attached as Exhibit A are affidavits from 20 of the 26 potential Stage I class members identified in the United States' initial disclosures. All 20 affiants self-identify as Native American. (Swedish Aff., Ex. A ¶ 1.) All 20 applied for a Specialist position at DSS's Pine Ridge office at least once between 2007 and 2013. (*Id.*, Ex. A ¶ 2.) All 20 affirm that they applied because they wanted the position and that they would have accepted the position if DSS had offered it. (*Id.*, Ex. A ¶ 3.) Nineteen of the 20 possessed a college degree at the time of their application to DSS (*Id.*, Ex. A ¶ 4; *id.*, Ex. A, Red Cloud Aff. ¶ 3(a)-(b)), and three had advanced degrees when they applied. (*Id.*, Ex. A, WhiteBull Aff. ¶ 4; *id.*, Ex. A, Degenhardt Aff. ¶ 4; *id.*, Ex. A, Cordova Aff. ¶ 4.) All 20 affiants were interviewed by DSS for a Specialist position. (*Id.*, Ex. A ¶ 5; *id.*, Ex. A, Hawk Aff. ¶ 4.) None were hired.

their Native American heritage in their application materials (*see* Swedish Aff., Ex. C, Johnson 30(b)(6) Dep. 79:6-21, 82:3-21; *id.*, Ex. G, Kearns Dep. 53:24-54:4; *see, e.g.*, *id.*, Ex. K, White Dep. (May 24, 2017) 74:13-75:5; *id.*, Ex. G, Kearns Dep. 115:11-24; *id.*, Ex. U, Nelson Application (DEF 005109-10); *id.*, Ex. U, Frogg Application (DEF 00907); *id.*, Ex. U, Black Bear Application (DEF 02736-37); *id.*, Ex. U, Provost Application (DEF 01848-51); *id.*, Ex. U, Rattler Application (DEF 02935)). They understandably (but mistakenly) believed that describing their familiarity with Native American culture would increase their chances of being hired.

Even if applicants did not self-identify as Native American in their applications, hiring officials made assumptions about the applicants' races based on their names and appearances. Despite testifying that "We never talked race. We were never informed of race" (Dkt. 43 at 16), Regional Manager Jim Treloar contradicted himself in a contemporaneous email. In an email to his supervisor Carrie Johnson, the Division Director for Economic Assistance, Mr. Treloar explained his assumptions about the applicants to a particular requisition:

> Of the seven candidates that were offered interviews, we think two may have been Native American. One was interviewed and one then had failed to contact us for an interview. The one that was interviewed did not have a surname that was typically Native American, but at the interview appeared to be Native American.

(Swedish Aff., Ex. Q, Treloar Email (DEF 12465).) Similarly, other DSS hiring officials testified that they could assume that an applicant was Native American based on physical characteristics during the interview or if the applicant had a name that was typically Native American. (*Id.*, Ex. D, Anderson Dep. 66:15-67:13; *id.*, Ex. H, Shedeed Dep. 128:1-15.) Accordingly, DSS's disavowal of any knowledge of applicants' race cannot be taken seriously. At the very least, the veracity of these hiring officials is a genuine issue of material fact that cannot be decided as a matter of law on summary judgment.

2. A Genuine Issue of Material Fact Exists Regarding Hiring Officials' Claim to Hire the "Best Qualified" Applicants

In support of its motion, DSS contends that its hiring officials "hired the most qualified applicants based on the knowledge, skills, and abilities as demonstrated by an applicant's application, interview, and references." (Dkt. 43 at 16.) In the deposition testimony cited, DSS hiring officials claim to "hire the best person for the job," the applicant "who you felt was best qualified," "your best candidate out of the process," "the person with the best skills, knowledge and abilities," and the "best qualified individual." (*Id.* at 16-17.) DSS suggests that these self-serving conclusory assertions of good faith in hiring cannot support a finding of intentional discrimination. Legally and factually, DSS's argument falls flat.

Like DSS, the defendant in *Teamsters* presented evidence that "consisted mainly of general statements that it hired only the best qualified applicants." 431 U.S. at 342 n.24. The Supreme Court was unconvinced, stating that "affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systemic exclusion." *Id.* (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)). If DSS's "affirmations of good faith" are insufficient to rebut the United States' *prima facie* case, they certainly cannot preclude the establishment of a *prima facie* case in the first place.

Moreover, these self-serving conclusory assertions must be weighed against DSS's apparent assumption that the best-qualified applicant would not be a Native American living on the Pine Ridge Indian Reservation. Tellingly, some Requisition Announcements asked applicants to "[d]escribe in detail your experiences working with persons from *different* cultural backgrounds," (Dkt. 47, Pl. SMF Ex. F, Weaver Report at 8 (emphasis added); *see also, e.g.*, Dkt. 47, Pl. SMF Ex. B, Requisition Announcements at 30), a clear indication the ideal candidate would not be a Native American from Pine Ridge. As the United States' expert, Dr. Hilary

Weaver, described: "Because DSS was interested in an applicant's knowledge of Native American culture, characterizing this as a 'different' cultural background than the applicant's presupposes that the applicant is a non-Native working with a Native population." (Dkt. 47, Pl. SMF Ex. F, Weaver Report at 8-9.) Keith Kearns, who previously served as an Employment Specialist Supervisor and currently is Regional Manager at DSS's Pine Ridge office, denied that the question would be meaningless for Native American applicants, but admitted to not having considered how a Native American applicant would consider the question. (*See* Swedish Aff., Ex. G, Kearns Dep. 186:22-188:1.)

Some Requisition Announcements also advertised the availability of carpooling to allow employees to travel together from outside the Reservation. (*See, e.g.*, Dkt. 47, Pl. SMF Ex. B, Requisition Announcements at 43-44; *see generally* Swedish Aff., Ex. J, Treloar Dep. (May 22, 2017) 49:22-50:19.) Shelly Lienemann, a white applicant hired as an Employment Specialist in 2010, testified that most employees, including all white employees, in DSS's Pine Ridge office commuted together from northern Nebraska:

> Q How many people at DSS were commuting in from Nebraska while you were working there?
> A Probably like -- if there was 60 people in the office, probably 30 or 40.
> Q And how many of the white employees in the office were commuting in from Nebraska?
> A Every single one. I don't think there was anybody who was not Native American who lived on the reservation.

(Swedish Aff., Ex. P, Lienemann Dep. 57:4-11.) Indeed, the Adult Services and Aging ("ASA") Regional Manager expressed frustration that more people from Martin, a nearby city outside the Reservation's limits, did not apply for an ASA Specialist requisition, stating in an email: "I m

[sic] so disappointed that we have no applicants from Martin or surrounding." (*Id.*, Ex. R, Kabris Email (DEF 15857).)[6]

Not only did DSS hiring officials presume that qualified applicants would come from outside Pine Ridge, but they also mistakenly believed that qualified Native Americans did not apply to be Specialists. DSS hiring officials suggested that qualified Native Americans preferred to work for the Oglala Lakota Sioux Tribe or for one of the federal government agencies operating on the Pine Ridge Indian Reservation, the Indian Health Service ("IHS") and the Bureau of Indian Affairs ("BIA"). (*See, e.g.*, *id.*, Ex. H, Shedeed Dep. 148:20-23; Dkt. 47, Pl. SMF Ex. S, White Dep. (May 24, 2017) 15:18-16:3.) In addition, DSS hiring officials expressed concern that DSS would later "lose" any qualified Native Americans it hired to the federal government agencies or the Tribe, possibly after only a brief tenure at DSS. (Swedish Aff., Ex. J, Treloar Dep. (May 22, 2017) 87:15-25; *see also id.*, Ex. J, Treloar Dep. (May 24, 2017) 63:10-13; *id.*, Ex. K, White Dep. (May 23, 2017) 43:5-11.) Why DSS officials made these assumptions only about Native American applicants is unclear.

DSS's assumptions notwithstanding, all potential Stage I class members applied to DSS because they wanted the Specialist position and they would have accepted the position if DSS had offered it. (*See, e.g., id.*, Ex. A ¶ 3.) Moreover, the undisputed facts do not demonstrate that DSS offered Specialist positions to Native American applicants who declined or left after a brief tenure; rather, the undisputed facts show that over the course of seven years, DSS offered Specialist positions to two Native Americans, both of whom accepted and continue to work at

[6] Nevertheless, Jeanie Montgomery, a white applicant hired in 2011, explained that, as an ASA Specialist based outside of Pine Ridge, she "had insufficient time to deal with such a culturally diverse and large geographic area," as Pine Ridge, Martin, and Hot Springs, and "[t]he result was that the needs of Native American customers on the Reservation were underserved." (Swedish Aff., Ex. B, Montgomery Aff. ¶ 6.)

DSS. (Dkt. 47, Pl. SMF ¶ 48; Dkt. 47, Pl. SMF Ex. C (Part II) Applicant Flow Documents (2007-2013) at 23, 31; Swedish Aff., Ex. S, DSS Pine Ridge Employee List (DEF 7856).) The unsupported assumptions made by DSS hiring officials about Native Americans' desire for the Specialist position seem to have colored their impressions of Native American applicants, leading them to rarely consider Native Americans to be the "best applicants."

Finally, DSS hiring officials' self-serving conclusory testimony must be questioned in light of the results of DSS's hiring from 2007 through 2013. During this time frame, DSS only twice considered Native American applicants to be the "best" applicants for the Specialist position.[7] (*See* Dkt. 47, Pl. SMF ¶ 48.) The evidence suggests that this is not due to a lack of qualified Native American applicants – in fact, Native American and white applicants were deemed minimally qualified for the Specialist positions and offered interviews at similar rates. (*Id.* ¶¶ 20, 71.) Rather, the disparities in hiring rates between Native American and white applicants arose following the interview. (*Id.* ¶¶ 74-76.)

Native American applicants themselves identified oddities in their interviews related to DSS's apparent assumption that the "best qualified" applicant would be a white candidate living outside of the Pine Ridge Indian Reservation. According to two of the United States' potential Stage I class members, DSS hiring officials asked during their interviews what they would do if their relatives applied for benefits from DSS's Pine Ridge office. (Swedish Aff., Ex. A, Red

[7] The two Native Americans hired by DSS, Debbie Bettelyoun and Stephanie Pourier, were both already known to the hiring officials at DSS's Pine Ridge office. Ms. Bettelyoun had previously worked in the office before being re-hired as an Employment Specialist in 2011. (Swedish Aff., Ex. J, Treloar Dep. (May 24, 2017) 82:20-24; Dkt. 47, Pl. SMF Ex. C (Part II), Applicant Flow Documents (2007-2013) at 23.) Similarly, Ms. Pourier worked as a secretary in the office, briefly left DSS, and then returned as an Employment Specialist in 2013. (Swedish Aff., Ex. E, Bakley Dep. 83:10-13, 112:3-5; Dkt. 47, Pl. SMF Ex. C (Part II), Applicant Flow Documents (2007-2013) at 31.)

Cloud Aff. ¶ 6; *id.*, Ex. A, Degenhardt Aff. ¶ 6.) Six other potential Stage I class members explain: "During my interview, I believe that the interviewers, based on the questions they asked and their demeanor, were treating my interview as a mere formality and had no intention to hire me." (*Id.*, Ex. A, Black Bear Aff. ¶ 6; *id.*, Ex. A, Pumpkin Seed Aff. ¶ 6; *id.*, Ex. A, LaPointe Aff. ¶ 6; *id.*, Ex. A, Cordova Aff. ¶ 6; *id.*, Ex. A, Red Owl Aff. ¶ 6; *id.*, Ex. A, White Bull Aff. ¶ 6.) These observations suggest that DSS's hiring practices should be analyzed "on a basis which assess[] their tendency to perpetuate an existing condition of underrepresentation" at Pine Ridge. *Am. Nat'l Bank*, 652 F.2d at 1198.

When looking at specific applicants, it is difficult to believe that DSS always selected the "best." For example, for Requisition 70184, DSS hired a white applicant named Lisa Heintzelman as an ASA Specialist despite the fact that she lacked all three "preferred" criteria that DSS hiring officials, including ASA Specialist Supervisor Nancy Sletto, claimed to look for when selecting applicants to hire: a college degree, case work experience, and familiarity with Pine Ridge and Native Americans. (Swedish Aff., Ex. I, Sletto Dep. 128:14-129:13, 131:22-25; *see generally* Dkt. 47, Pl. SMF ¶ 19.) In contrast, Irene Red Cloud (formerly, Irene Sandoval), a Native American applicant who was not extended an interview, possessed each of these qualifications that the ultimate hire lacked. (*See* Swedish Aff., Ex. I, Sletto Dep. 139:14-140:18; Dkt. 47, Pl. SMF Ex. Q, Sletto Dep. 144:18-25.)

In 2010, DSS hired Shelly Lienemann to be an Employment Specialist. Of the three "preferred" criteria DSS hiring officials claimed to look for in applicants, Ms. Lienemann possessed only one: a college degree. (Swedish Aff., Ex. P, Lienemann Dep. 11:22-24.) Ms. Lienemann conceded that she had no personal experience with Native American culture (*id.*, Ex. P, Lienemann Dep. 34:8-11) and that she lacked familiarity with the Pine Ridge Indian

Reservation: "Yeah, yeah, I'd never been to the actual – the 'rez' rez" (*id.*, Ex. P, Lienemann Dep. 35:4-19). Similarly, Ms. Lienemann admitted she had no relevant experience, stating that in her interview:

> I was going back to my internships, and I was always trying to throw those in, and you know, trying to show that I had experience. Because that's one of the hard things when you're, like, trying to get a job out of college. It's kind of, like, Yeah, I don't have anything. You know. Like, no offense, but I got bupkus, okay. So please pay me.

(*Id.*, Ex. P, Lienemann Dep. 128:10-16.) DSS hired Ms. Lienemann instead of qualified Native American applicants, such as Denise Red Owl and John Cedarface. (*See* Dkt. 47, Ex. C (Part I), Applicant Flow Documents (2007-2013) at 18.) Ms. Red Owl had a bachelor's degree, case work experience including as an ASA Specialist at DSS's Pine Ridge office, and demonstrated familiarity with Pine Ridge. (*See* Swedish Aff., Ex. I, Sletto Dep. 171:10-172:19; *see also id.*, Ex. G, Kearns Dep. 43:13-19.) John Cedarface had a bachelor's degree, considerable experience as an educator and school administrator, and demonstrated familiarity with Native American culture. (*See id.*, Ex. G, Kearns Dep. 191:12-192:15; *id.*, Ex. A, Cedarface Aff. ¶ 4.)

Ms. Red Owl and Mr. Cedarface were also passed over for hire as Benefits Specialists in 2010, when DSS instead hired two white recent college graduates, Courtney Dolezal (née Courtney Finney) and Kortney Dolezal (née Kortney Kling). (*See* Dkt. 47, Pl. SMF Ex. C (Part I), Applicant Flow Documents (2007-2013) at 17.) The Dolezals had virtually no experience with Pine Ridge, explaining that they were familiar with the Reservation largely from having driven through it on their way from northern Nebraska to Rapid City. (Swedish Aff., Ex. N, C. Dolezal Dep. 13:8-24; *id.*, Ex. O, K. Dolezal Dep. 25:12-26:13.) Although both Dolezals had college degrees, neither applicant's degree was relevant to the position and neither had case work experience. Kortney Dolezal's degree was in early childhood development, and her only

experience prior to DSS was in childcare settings. (*Id.*, Ex. O, K. Dolezal Dep. 11:4-22, 15:13-19.) Courtney Dolezal's degree was in park and recreation management, and her primary experience prior to DSS was in fisheries and office management. (*Id.*, Ex. N, C. Dolezal Dep. 14:10-23, 17:8-18:14.)

Not only did DSS pass over qualified Native American applicants for less qualified white applicants, but DSS also canceled requisitions instead of hiring well-qualified Native American applicants. For example, Native American applicant Denise Red Owl previously worked for DSS's Pine Ridge office as an ASA Specialist. (*See id.*, Ex. I, Sletto Dep. 169:8-10.) Nevertheless, when Ms. Red Owl applied for ASA Specialist positions in 2010 and 2011, DSS canceled the requisitions rather than re-hiring her to perform a job she previously held. (*See* Dkt. 47, Pl. SMF Ex. C (Part I), Applicant Flow Documents (2007-2013) at 14; Dkt. 47, Pl. SMF Ex. C (Part II), Applicant Flow Documents (2007-2013) at 22; *see also* Dkt. 47, Pl. SMF ¶¶ 37-38.) In comparison, when a white applicant named Billie Green applied for a Benefits Specialist position in 2013, Benefits Specialist Supervisor Michael Bakley emphasized that he offered her the position primarily based on her previous experience in the Benefits Specialist position years before. (Swedish Aff., Ex. E, Bakley Dep. 167:16-168:8.)

Also in 2013, DSS canceled an Employment Specialist requisition rather than select Native American applicant Ruby-Ann Red Feather Degenhardt. (*See* Dkt. 47, Pl. SMF ¶¶ 137-138.) Although Regional Manager Jim Treloar stated that Ms. Degenhardt's master's degree in social work and her casework experience made her a "strong candidate" (*see* Dkt. 47, Pl. SMF Ex. R, Treloar Dep. (May 24, 2017) 53:10-17; Swedish Aff., Ex. J, Treloar Dep. (May 24, 2017) 51:20-22), other DSS hiring officials claim to have considered applicants with advanced degrees to be "overqualified" (Swedish Aff., Ex. E, Bakley Dep. 159:8-9; *id.*, Ex. K, White Dep. (May

24, 2017) 68:19-23). Benefits Specialist Supervisor Michael Bakley clarified his position, stating, "Not overqualified, but it's –. . . . It's not something that would definitely eliminate, but it's definitely something that I as a supervisor would note that gosh, that's a lot of education for this level position." (*Id.*, Ex. E, Bakley Dep. 159:14-22.)

A close review of the hiring decisions made by DSS belies the hiring officials' testimony that they always selected the "best" applicants. Rather, their testimony highlights a genuine issue of material fact that cannot be decided as a matter of law on summary judgment.

3. Additional Anecdotal Evidence Demonstrates Discrimination Against Native Americans at DSS's Pine Ridge Office

Finally, DSS is simply incorrect that there is a "lack of anecdotal evidence demonstrating actual instances of discrimination." (Dkt. 43 at 17.) To the contrary, additional anecdotal evidence developed during discovery creates a genuine dispute of material fact about discrimination at DSS's Pine Ridge office.

According to Jennifer Vanhove, a white Benefits Specialist, Benefits Specialist Supervisor Ron Shedeed, one of the hiring officials during the period at issue in this case, "repeatedly ma[d]e racially derogatory and insensitive comments about the Native Americans that DSS served at the Pine Ridge Office," including in locations in which he could be heard by the clients. (Swedish Aff., Ex. B, Vanhove Aff. ¶¶ 6-7.) Ms. Vanhove complained about Mr. Shedeed's behavior to Regional Manager Jim Treloar. (*Id.* ¶ 8.) As a result, Ms. Vanhove was transferred from Mr. Shedeed's supervision, but Mr. Shedeed was not reprimanded or disciplined for his behavior. (*Id.* ¶¶ 9-10; Swedish Aff., Ex. H, Shedeed Dep. 150:18-152:13.)

Potential class member witnesses also describe white Specialists displaying cultural insensitivity toward their Native American clients and their Native American coworkers. (Swedish Aff., Ex. A, Bordeaux Aff. ¶¶ 8-10; i*d.*, Ex. A, Hawk Aff. ¶¶ 6-7; *id.*, Ex. A, Red Owl

Aff. ¶¶ 8-9; *id.*, Ex. A, WhiteBull Aff. ¶¶ 7-9.) This cultural insensitivity was echoed during depositions with former white Specialists who were hired between 2007 and 2013. Kristian Bourne (née, Kristian Deppe), a white Benefits Specialist hired in 2010, testified that rather than working to "build[] up" the Native American clients they were tasked with helping, her white coworkers had a "stigma" around Native Americans:

> Q Did you ever see anything that you -- that rubbed you the wrong way in your coworker's treatment of Native Americans?
> A Sure.
> Q Like what?
> A I don't remember specific things, but sometimes just the -- the tone of voice or sometimes the stigma that they might have had around Native Americans.
> Q What stigma around Native Americans?
> A Just -- you know, just maybe not always having a great attitude about Native Americans as far as their worth -- or their work ethic or their desire to do anything different with their lives.

(*Id.*, Ex. M, Bourne Dep. 60:24-61:12.)

Indeed, Bourne's white coworkers demonstrated such a "stigma" toward Native Americans during their depositions. When Courtney Dolezal, hired as a Benefits Specialist in 2010, was asked why there were so few Native Americans working at a DSS office in the middle of a Reservation, she said simply, "They don't have a strong work ethic." (*Id.*, Ex. N, C. Dolezal Dep. 56:14-17.) Meanwhile, Shelly Lienemann, hired as an Employment Specialist in 2010, described exploiting Native Americans on Pine Ridge on social media:

> Q When we talked on the phone before, you said the reservation, the economic plight of the reservation, was depressing, right?
> A Oh, my gosh, yes. Like the houses are just completely dilapidated. We call them rez cars, and if we see a really good one we'll actually take pictures and put it on Facebook.
> Q What's a rez car? I don't know --
> A It's a really beat-up one, with, like, the door is missing. We had one where the windshield was blocked out in the back, and then you had two little tiny kids in the back with the windshield not there, and just. . . wild.

(*Id.*, Ex. P, Lienemann Dep. 121:16-122:2.) Summary judgment is inappropriate because there is a genuine issue of material fact regarding whether these racially discriminatory sentiments by the employees in DSS's Pine Ridge office impacted the office's hiring decisions.

In sum, DSS mischaracterizes and understates the anecdotal evidence present here. A genuine issue of material fact exists regarding DSS's knowledge of applicants' race and DSS's assertion that it always hired the "best" applicant. Moreover, the United States has presented anecdotal evidence regarding discrimination more generally in the office. With this anecdotal evidence, in addition to the undisputed statistical and anecdotal evidence presented in the United States' Motion for Partial Summary Judgment, a reasonable fact-finder could find that the United States has established its *prima facie* case that DSS engaged in a pattern or practice of discrimination against Native American applicants for Specialist positions at Pine Ridge from 2007 through 2013.

IV. DSS IS NOT ENTITLED TO SUMMARY JUDGMENT ON INJUNCTIVE RELIEF

Finally, DSS has not demonstrated that it is entitled to summary judgment on the United States' claim for injunctive relief. Under the burden-shifting standard established in *Teamsters*, if the United States establishes a *prima facie* case of a pattern or practice of discrimination and DSS is unable to rebut the resulting presumption, then the Court can "conclude that a violation has occurred" and award prospective, injunctive relief "[w]ithout any further evidence from the Government." *See Teamsters*, 431 U.S. at 361. In support of its motion, DSS contends that it should not be subject to prospective injunctive relief because its hiring of Native Americans into one of the three Specialist positions improved for two years. (*See* Dkt. 43 at 17.) This is simply an insufficient basis for discarding as a matter of law a critical pillar of relief in systemic cases. Importantly, the statistics on which DSS relies do not justify eliminating injunctive relief because

they represent only limited hiring for one of three positions at issue, they do not explain why the statistically significant disparity in hiring between Native American and white applicants disappeared in 2014, and they do not demonstrate that DSS has adopted safeguards to ensure that it will comply with Title VII going forward.

If the Court finds that DSS engaged in a pattern or practice of discrimination against Native American applicants, "an award of injunctive relief is appropriate." *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 888 (D. Minn. 1993) (citing *Craik v. Minn. State Univ. Bd.*, 731 F.2d 465, 470 (8th Cir. 1984)); *see also Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 147 (2d Cir. 2012). The Supreme Court has held that "a court's finding of a pattern or practice justifies an award of prospective relief," such as "an injunctive order against continuation of the discriminatory practice, an order that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order 'necessary to ensure the full enjoyment of the rights' protected by Title VII." *Teamsters*, 431 U.S. at 361. "In awarding injunctive relief, the Court must 'render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Jenson*, 824 F. Supp. at 888 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).

Although DSS's hiring of Benefits Specialists in 2014 and 2015 did not result in statistically significantly different hiring rates of Native American and white applicants, this statistical evidence covered only two years and only one of the Specialist positions. To be clear, DSS simply did no hiring for either the ASA Specialist or the Employment Specialist position at its Pine Ridge office in 2014 or 2015. Moreover, the reason for the change in hiring of Benefits Specialists is still very much at issue. DSS's implementation of competency-based hiring in early 2014 may have affected changes in DSS's hiring for those two years. The improved hiring,

however, could be equally attributed to more ephemeral causes. For instance, in 2013, the EEOC found reasonable cause to believe that Native American applicants had been discriminated against in hiring, shining a spotlight on DSS's hiring practices. (Swedish Aff., Ex. T, EEOC Letter of Determination (US00000069-70); Dkt. 47, Ex. A, Stipulation Between the Parties Regarding the United States' First Set of Requests for Admission ("Stipulation") ¶ 8.) Alternatively, in November, DSS promoted Rhonda Barker to Benefits Specialist Supervisor (Swedish Aff., Ex. F, Barker Dep. 17:14-17), and she was responsible for most of the Benefits Specialists hired in 2014 and 2015 (Dkt. 47, Ex. A, Stipulation ¶¶ 59, 61, 63, 65 71, 73, 75). Ms. Barker's hiring record indicates that her first choice to hire was consistently a Native American. (Swedish Aff., Ex. F, Barker Dep. 160:21-24, 162:6-19.) Neither explanation will ensure that DSS's short track record of possibly nondiscriminatory hiring will outlast this litigation.

Because it is unclear why the statistically significant disparity in hiring between Native American and white applicants disappeared in 2014 and whether DSS will comply with Title VII in the future, the Court should hear evidence before determining whether to impose injunctive relief to ensure that DSS's future Pine Ridge hiring will not regress to the seven-year pattern of discrimination seen from 2007 through 2013. Indeed, the Court should examine carefully the timing and substance of changes to DSS's hiring practices. *See, e.g., Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. at 1075 n.9 (noting that an employer's company-wide response to sexual harassment was not initiated until after a lawsuit was filed). Accordingly, the United States maintains its request for injunctive relief to ensure that DSS complies with Title VII.

V. CONCLUSION

In conclusion, DSS is not entitled to summary judgment. The United States' evidence, including gross statistical disparities and anecdotal evidence suggesting pervasive discrimination

based on the race of applicants, is sufficient for a reasonable fact-finder to conclude that DSS engaged in a pattern or practice of intentional discrimination against Native American applicants for Specialist positions at its Pine Ridge office from 2007 through 2013. DSS's arguments to the contrary are baseless. Moreover, summary judgment for DSS on injunctive relief would be inappropriate, and the United States maintains its request for injunctive relief to ensure that DSS complies with Title VII.

Pursuant to Local Rule 7.1(C), the United States respectfully requests the opportunity to appear before the Court in opposition to DSS's Motion for Summary Judgment.

Date: September 26, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jennifer M. Swedish, hereby certify that on September 26, 2017, the Memorandum in Opposition to Defendant's Motion for Summary Judgment was served on the following attorneys of record for the South Dakota Department of Social Services via the Court's CM/ECF system:

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